



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

December 19, 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

DATE: December 12, 2003

SUBJECT: Environmental Justice News for the Week Ending December 12, 2003

FROM: Nicholas Targ, Counsel
Office of Environmental Justice, OECA, USEPA

Mustafa Ali, Environmental Protection Specialist
Office of Environmental Justice, OECA, USEPA

TO: Barry E. Hill, Director
Office of Environmental Justice, OECA, USEPA

This summarizes environmental justice news for November 29, 2003, through the week ending December 12, 2003. Except as noted, this review is confined to Lexis/Nexis queries conducted under the following search: "(environment! w/2 (justice or racism or equity or disproportionate or disparate)) or (environment! w/50 minorit! or low***income) or (executive order 12898) or (civil right! w/50 environmental)". Please note that we have not included multiple articles covering the same topic or articles pertaining to international or foreign-based environmental justice issues, unless they have a direct connection to the United States.

For the week ending December 12, 2003, the following news is current:

A. News-

1. Vianna Davila, "Workers Union addresses inequities; The organization is celebrating 15 years of community activism," San Antonio Express-News San Antonio, Texas (December 10, 2003).

Fifteen years of community activism and empowerment was celebrated last weekend by The Southwest Workers' Union. The union was founded in 1998 to address issues such as environmental justice and economic equity. "Southwest Workers' Union is best known for its work on environmental contamination in and around the former Kelly AFB," according to the article.

2. "NRC regulations recognize environmental justice," Nuclear News, (December, 2003).

"The Nuclear Regulatory Commission on October 31 issued for public comment a draft policy statement on the treatment of environmental justice matters in agency regulatory and licensing actions," the article reports. "In drafting the statement, the NRC said in a press release that it 'recognizes that the impact

of its regulatory or licensing actions on certain populations may be different from those on the general population due to a community's distinct cultural characteristics. The draft policy statement reflects the view that the disproportionately high and adverse impacts of a proposed action that fall heavily on a particular community call for close scrutiny under the National Environmental Policy Act (NEPA), "the article states. Comments on the draft policy must be submitted within 60 days of publication in the Federal Register.

3. Stacey Shackford, "Top New Award for Environment Man," Aberdeen Press and Journal Aberdeen, Scotland (November 29, 2003).

Queen Margaret University College, Edinburgh has awarded the first Higher Education Certificate in environmental justice to eleven students. "The 18-month course is the first of it's kind in the UK, was funded by cash from the National Lottery and aims to provide support and education for community activists working to protect and improve their local environment," as reported by the article.

4. "The Press-Enterprise," Press Enterprise Riverside, California (December 6, 2003).

On December 9 in Glen Avon, California the Center for Community Action and Environmental Justice honored Communities Against Toxic Exposure, Friends of Riverside's Hills and Helping Our Mira Loma Environment with their annual "Dr. Zweig Environmental Health Advocate Award"

5. Meredith Goad, "Spinach may help to get the lead out; A USM scientist who planted gardens found soil contamination reduced," Portland Press Herald Portland, Maine (December 4, 2003).

With the help of a small environmental justice grant from the U.S. Environmental Protection Agency a soil scientist in Portland Maine is using spinach gardens to fight lead contamination. Dr. Samantha Langley-Turnbaugh is testing phytoremediation as a possible way of addressing the lead contaminated soil in the Bayside community. There are some locations in the community that has contamination levels of more than 7,000 parts per million, while the state of Maine considers 375 parts per million safe. "Preliminary results show that the contamination in one yard that has been tested was cut in half by the spinach garden."

6. "Mobile's Proposed Southpoint Landfill Subject of Civil Rights Dispute; NAACP and Historic African-American Community File Civil Lawsuit Against Maricopa County Board of Supervisors," Business Wire (December 12, 2003).

"The historic African American town of Mobile, Arizona in conjunction with the NAACP, filed a civil complaint against the Maricopa County Board of Supervisors for an alleged series of racially discriminatory zoning actions that have violated the civil rights of the community's residents and landowners," article reports. Mobile has around 100 residents but has three major landfills which handle 44% of the capacity for the entire county and recently a 690 acre proposed refuse lot, according to the article. Howard M. Shanker, attorney to the plaintiffs said, "This is a prime example of environmental racism. The board has unfairly discriminated against the community on the basis of race, purposefully and intentionally' making Mobile the industrial dumping ground for the county and state."

B. Litigation

Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520 (10th Cir 2003).

The 10th Circuit vacated the Surface Transportation Board's (STB's) approval of the Dakota, Minnesota & Eastern Railroad Corporation's proposed construction of a line to service coal mines in Wyoming's Powder River Basin and to make other upgrades. While upholding most aspects of the STB's decision, the court found violations of NEPA with respect to consideration of the effects of noise and vibration, including synergistic effects, and air pollution. The court, however, upheld the Board's environmental justice analysis, against claims of methodological defects.

Save Our Valley v. Sound Transit (Central Puget Sound Regional Transit Authority), 335 F.3d 932 (9th Cir. 2003).

The 9th Circuit Court held that alleged violations of an agency's disparate impact regulations do not give rise to a cause of action under 42 U.S.C. § 1983. The Circuit Court summarized its holding as follows: Violations of rights, not violations of laws, give rise to § 1983 actions. *Gonzaga*, 536 U.S. at 285; *Blessing*, 520 U.S. at 340. Plaintiffs suing under § 1983 must demonstrate that a statute - not a regulation--confers an individual right. *S. Camden Citizens in Action*, 274 F.3d at 781; *Harris*, 127 F.3d at 1008-09. As an agency interpretation of a statute, a regulation may be relevant in determining the scope of the right conferred by Congress. *S. Camden Citizens in Action*, 274 F.3d at 783. Agency regulations therefore may be considered in applying the three-prong *Blessing* test. See *Buckley*, 66 F.3d at 190. But the inquiry must focus squarely on Congress's intent. The paramount consideration is to determine if Congress intended to create the particular federal right sought to be enforced. See *Suter*, 503 U.S. at 357; *S. Camden Citizens in Action*, 274 F.3d at 788.

United States v. E.F.I. DuPont De Nemours, No. 5:03CV-175-R (WD KT 2003).

The United States Department of Justice lodged a consent decree in the above captioned case resolving the government's claims under the General Duty of Care provision of the Clean Air Act, § 112(r)(1). The settlement provides for a civil penalty and eight Supplemental Environmental Projects valued at \$552,000, including: (1) training and response equipment for Local Emergency Planning Committees; (2) a green buffer zone between the facility and the surrounding area; (3) and a "contract with a community group in an environmental justice area to set up a website on environmental issues. . . ."

Franks v. Ross, No. 5:00-CV-936-BO(3), 2003 U.S. Dist. LEXIS 21928 (E.D.NC 2003).

In the most recent phase of this ongoing case, which involves the proposed construction of a landfill in an African American community that has "long borne a disproportionate share of Wake County's landfills," the court granted the County's motion to dismiss the plaintiffs' Title VIII claim, and denied, in part, the County's motion to dismiss the residents' Title VI and 14th Amendment claims. With respect to the Title VIII claim, the court reasoned analogous to *Jersey Heights Neighborhood Assoc. et al. v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999). The court quoted that case for the proposition that "the causal link between the [County's siting] decisions and the housing grievances covered... [are] simply too tenuous to bring such decisions within the ambit of the Act." With respect to the Title VI and 14th Amendment claims, the court dismissed plaintiffs' disparate impact claims, under *Sandoval* and *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003), but let stand the claims involving intentional discrimination.

Almendaes v. Palmer, Case No. 3:00CV7524, 2003 U.S. Dist. LEXIS 15422 (N.D. Ohio 2003).

Plaintiffs, low-income, "limited English proficient" recipients of food stamps and applicants for driver's licenses, brought actions under Title VI, alleging that the State's and the County's failure to provide pertinent information in Spanish violated Title VI of the Civil Rights Act of 1964. The trial court denied the State's motion to dismiss plaintiffs' Title VI (§601) action, reasoning that while the *Sandoval* requires a showing of intentional discrimination, "plaintiffs allege that defendants' knowledge of and long-term noncompliance with the Food Stamp Act and its regulations is evidence of intentional discrimination."

Pine Bluff for Safe Disposal v. Arkansas Pollution Control and Ecology Commission, No. 02-885, 2003 Ark. LEXIS 566 (Ark. October 30, 2003).

The Arkansas Supreme Court dismissed plaintiffs' environmental justice claim, finding that "[g]iven that there is substantial evidence to support the AHO's conclusion that the permits will adequately protect the public health and environment and that no adverse health effects to

any persons will result from the Facility's emissions, it logically follows that there will be no adverse impact on minorities and low-income persons.”

C. Regulatory

United States EPA, Notice of Public Comment, “Toolkit for Assessing Potential Allegations of Environmental Injustice,” 68 Fed. Reg. 62588 (Nov. 5, 2003).

The Federal Register notice provides as follows, “The Office of Environmental Justice seeks public comment on the draft ‘Toolkit for Assessing Potential Allegations of Environmental Injustice.’ The toolkit provides tools and other reference materials to assist U.S. Environmental Protection Agency (EPA) personnel in assessing allegations of environmental injustice. Also, the document provides a framework for understanding national policy on the subject of environmental justice.” Comments must be received before March 4, 2004, addressed: Mr. Barry E. Hill, Director, Office of Environmental Justice, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Mailcode 2201A, Ariel Rios South Building, Room 2232, Washington, DC 20460-0001. The document is available online at: www.epa.gov/compliance/recent/ej.html

Nuclear Regulatory Commission, “Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions,” 68 Fed. Reg. 62642 (November 5, 2003).

Consistent with its reasoning Louisiana Energy Service 47 NRC 77 (1998), the Nuclear Regulatory Commission’s policy provides that “[t]he legal basis for analyzing environmental impacts of a proposed Federal action on minority or low-income communities is NEPA, not Executive Order 12898. . . . The NRC considers and integrates what is referred to as environmental justice matters in its NEPA assessment of particular licensing or regulatory actions.” The policy provides further, “[I]n evaluating the human and physical environment under NEPA, effects on low-income and minority communities may only be apparent by considering factors peculiar to those communities. Thus, the goal of an EJ portion of the NEPA analysis is (1) to identify and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities. It is not a broad ranging review of racial or economic discrimination.”

Department of Defense, “Munitions Response Site Prioritization Protocol,” 32 CFR Part 179 (August 22, 2003).

The proposed rule provides a risk-based methodology for prioritizing sites for demilitarization of unexploded ordinance and related material. Other factors will also be considered including, “[c]ultural, social, and economic factors, including environmental justice considerations...” The rule’s accompanying regulatory analysis states that, “DoD plans to continue to study the environmental justice effects once the Protocol is implemented.”

Pennsylvania, 33 Pa.B. 5250, Notice of availability of Technical Guidance, “Interim Environmental Justice Policy,” DEP ID: 012-0501-002, Department of Environmental Protection (October 18, 2003).

The notice provides as follows, “The Department is proposing to expand its public participation activities for some permits in specific geographic areas to accommodate environmental justice concerns. In Spring 1999, the Environmental Justice Work Group (EJWG) was established to assist the Department in meeting its environmental justice objectives. In June 2001, the work group issued its report that made recommendations in five broad categories: improving the condition of environmentally burdened communities; the permitting process; monitoring and enforcement; Department organizational change; and ensuring implementation. The purpose of this policy is to implement certain recommendations of the EJWG Report of June 2001. Specifically, it provides direction and guidance to Department staff on how to enhance public participation during the permitting process for some permits in certain areas. It also describes how the Department intends to address the recommendation to improve the conditions of environmentally burdened minority and low-income communities through ongoing watershed-based strategic planning initiatives. Comment Period Ends: December 18, 2003. Effective Date: Effective immediately, with 60-day open comment period. Contact: Alisa Harris, (717) 783-5630, aharris@state.pa.us.” The document is available online at <<http://www.dep.state.pa.us/eps/default.asp?P=fldr20027081209004>>

New Jersey, Adoption of N.J.A.C. 7:1-1.2 and 1.3, October 1, 2003.

The rule reorganizes the Department of Environmental Protection by, among other things, abolishing the office of Office of Equal Opportunity, Contract Assistance, and Environmental Equity in the Office of the Chief of Staff, and creating in the newly established Office of the Director of the Policy, Planning and Science Program, “[t]he Environmental Justice Program, which provides citizens in disenfranchised communities with information on opportunities to participate in the environmental decision-making process at the State level.”

D. Legislation

108 S. 1833,” Healthcare Equality and Accountability Act,” introduced by Senator Thomas Daschle (D-SD) on November 6, 2003. *Status: Referred to the Committee on Health, Education, Labor, and Pensions.* Sister bill 108 H.R. 3459, introduced by Elijah Cummings (D-MD) on November 6, 2003. *Status: 11/6/2003 Referred to House Energy and Commerce, 11/14/2003 referred to the Subcommittee on Health; 11/6/2003 referred to House Education and the Workforce, 12/1/2003 referred to the Subcommittee on Employer-Employee Relations, 12/1/2003 referred to the Subcommittee on Workforce Protections, 12/1/2003 referred to the Subcommittee on 21st Century Competitiveness, 12/1/2003, referred to the Subcommittee on Education Reform; 11/6/2003 referred to House Judiciary; 11/6/2003 referred to House Ways and Means; 11/6/2003 referred to House Agriculture.*

Among other provisions of this bill, Title 4 would establish the Environmental Justice Act of 2003. These provisions would largely codify Executive order 12898 and would also establish an office of environmental justice in EPA and a federal advisory committee to provide advice on environmental justice issues.

108 H.R. 2828, "Water Supply, Reliability, and Environmental Improvement Act,” introduced by Clavert Kern (R-CA) on July 23, 2003. *Status: 7/23/2003 referred to House*

Resources, 7/24/2003 referred to the Subcommittee on Water and Power, 7/24/2003 Subcommittee Hearings held, 9/25/2003 Subcommittee Consideration and mark-up session held, 9/25/2003, forwarded by Subcommittee to full Committee by voice vote; 7/23/2003 referred to House Transportation and Infrastructure, 7/24/2003 referred to the Subcommittee on Water Resources and Environment.

Among other things, § 201 of this expansive Reclamation bill would establish the CALFED Bay-Delta Program. In particular, § 201(d)(12) provides for appropriations to be applied to “Coordination of public outreach and involvement, including tribal, environmental justice, and public advisory activities under the Federal Advisory Committee Act.”